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SUPREME COURT, U.S.

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NO. 06-1407

In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

WILLIAM TERRY, Warden, Georgia Diagnostics Prison

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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June 4, 2007

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REPLY TO BRIEF IN OPPOSITION

Petitioner Troy Davis respectfully petitions this Court to grant certiorari and consider whether habeas courts may bypass the "gateway" innocence issue in cases with substantial evidence of innocence or remand to the Court of Appeals with direction to reconsider in light of this Court's decisions in *House v. Bell*, 126 S.Ct. 2064 (2006) *and Schlup v. Delo*, 513 U.S. 298, 315 (1995). Respondent mischaracterizes Petitioner's argument, the Eleventh Circuit's opinion and the district court opinion.

1. Petitioner claims that review of his substantial evidence of innocence is required and necessary to understand the merits of his constitutional claims. Petitioner's use of the adjective "substantial" to describe his innocence evidence does not alter the nature of his innocence claim. In *Schlup v. Delo*, this Court described two distinct types of innocence claims: the "novel substantive constitutional claim" asserted in *Herrera v. Collins*, 506 U.S. 390 (1993) and a "procedural" claim presented in *Schlup*. In *Herrera*-type substantive claims, innocence alone provides a theoretical constitutional basis for habeas relief. In *Schlup*-type procedural claims, innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315.

Petitioner has asserted a *Schlup*-type "procedural" innocence claim and has never raised -- as Respondent argues -- a *Herrera*-type substantive claim. Thus, the Eleventh Circuit correctly stated that "Davis does not make a [*Herrera-type*] substantive claim of actual innocence." Respondent's

claim that the above statement means that the Eleventh Circuit considered Petitioner's innocence evidence and found it insubstantial is a blatant mischaracterization. Further, Respondent's argument that Petitioner has raised a *Herrera*-type claim for the first time in his Petition for Certiorari is equally wrong. Petitioner has argued that his *substantial* evidence of innocence sheds light and gives context to the review of his underlying constitutional claim, thus the courts below should not have bypassed the innocence question. Respondent's substitution of the word "substantive" for Petitioner's use of the word "substantial" is a mischaracterization of Petitioner's argument.

2. No court has ever examined the full panoply of new evidence to determine if Mr. Davis is innocent. Respondent argues that Petitioner's claim that the district court ignored his gateway innocence claim is "unfounded" because the court "reviewed each affidavit proffered *during the state habeas corpus* proceeding." (emphasis added). Respondent fails to point out that the district court refused to consider the bulk of Petitioner's innocence evidence -- affidavits proffered for the first time *in federal court*. Although the district court admitted into the record six affidavits that Petitioner proffered in his state habeas proceeding, the court declined to consider any of the affidavits Petitioner proffered in federal court -- the lion's share of Petitioner's innocence claim -- because it found that they were procedurally barred by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Appendix A at 37. The court concluded that it need not evaluate any of Petitioner's innocence evidence introduced for the first time in federal court because AEDPA precluded an evidentiary hearing "even if" Petitioner could prove his innocence. Appendix A at 30a, 33a, 36a, 37a.

This Court has repeatedly and consistently held that a petitioner's claim of actual innocence must be examined "in light of all the evidence."[1] The evidence that the district court refused to evaluate included: (1) the affidavit of a witness who saw Red Coles shoot Officer McPhail, (2) the testimony of two witnesses who swore that Red Coles confessed to shooting McPhail, (3) the recantation of prosecution witness Dorothy Ferrell, (4) the testimony of prosecution witness Harriet Murray that implicates Red Coles as the shooter, (5) the recantation of prosecution witness and victim Larry Young, (6) the recantation of prosecution witness Antoine Williams, (7) the recantation of prosecution witness D.D. Collins, (8) the recantation of prosecution witness Benjamin Gordon and (9) the recantation of prosecution witness Jeffery Sapp.

In *House v. Bell*, the habeas petitioner asserted his innocence as a gateway to consideration of his defaulted constitutional claims of ineffective assistance of counsel and prosecutorial misconduct. 126 S.Ct. 2064, 2075 (2006). This Court reversed the district court because the court "did not clearly apply *Schlup*'s predictive standard" to the petitioner's innocence evidence. *Id.* at 2078. Here, the district court's mere summary of a portion of the affidavits and its subsequent refusal to consider the lion's share of Petitioner's innocence evidence as part of the record does not, as the Respondent asserts, constitute a determination of whether "in light of all the evidence" Mr. Davis is innocent. *Id.* at 2078. Thus, Petitioner has requested that the Court grant certiorari

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[1] *House v. Bell*, 126 S. Ct. 2064, 2077 (2006); *Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Schlup*, 513 U.S. at 327-328; *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Sawyer v. Whitley*, 505 U.S. 333, 339 n. 5 (1992); *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n. 17 (1986) (plurality).

to determine whether a habeas court can avoid its fact-finding function by skipping the gateway innocence question.

3. Respondent's argument that this Court in *Schlup* "expressly permit[ed] bypassing the gateway provision if the reviewing court is satisfied that no constitutional error occurred" frames an important controversy warranting the grant of certiorari. Respondent and the district court cite the same pages of this Court's opinion in *Schlup* for two contradictory propositions, namely that (1) that the court must in the first instance look to colorable claims of actual innocence for "permission to address questions of constitutional impropriety," and yet, notwithstanding this initial "permission" hurdle, (2) the district court need not get permission to address procedurally-defaulted constitutional claims if it is "satisfied that no constitutional error occurred." (Petitioner's Supplemental Appendix at p. 66 (citing *Schlup*, 513 U.S. at 315-16)).

In fact, Respondent's quotation from *Schlup* cited on page 28 of its Brief in Opposition can be found nowhere in this Court's opinion in form or substance. Respondent writes:

> ... [T]his Court in *Schlup*, specifically authorized bypassing the gateway provision if the reviewing court found that, "*If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" [sic] gateway need not be implemented.*" *Schlup*. 513 U.S. at 316. (Respondent's Brief at 28).

Instead, Respondent's citation points to the following statement from this court:

> If a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner

> should be allowed to pass through the gateway and argue the merits of his underlying claims. *Schlup,* 513 U.S. at 316.

Recently, in *House* this court stated that "it bears repeating that the *Schlup* standard is demanding and permits review only in the extraordinary case." 126 S. Ct. at 2077. Petitioner argues that "gateway" innocence determination in a *Schlup*-type claim is necessary to this Court's prioritization of judicial resources. *Schlup's* innocence gateway was meant to serve as a screen to conserve judicial resources for "those who were truly deserving." *Schlup*, 513 U.S. at 321. Instead, the courts below reviewed Petitioner's claims without reference to whether his case was the "rare," "extraordinary case." *Id.* As a result, Petitioner received perfunctory review of his constitutional claims without the benefit of the fact finding and credibility assessments required to make a *Schlup* innocence gateway determination. If the lower court's decision is accepted, the truly "exceptional" innocence cases will be lumped together with non-meritorious masses, negating the interests of comity, finality and -- most importantly -- justice for the innocent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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